No. 00-957

Supreme Court, U.S.
FILED
JUN 15
JUN 15 2001
CLERK

In the Supreme Court of the United States

In the Matter of the Care and Treatment of Michael T. Crane,

State of Kansas,

Petitioner,

v.

Michael T. Crane,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, FLORIDA, IOWA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, WASHINGTON AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RECEIVED
JUN 21 2001
LDC

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
LISA ANNE HOFFMAN
Counsel of Record
MARGARET M. O'CONNELL
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2640

Counsel for *Amici* States

(Additional counsel listed on inside front cover)

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

20 pp

BILL PRYOR
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130

JANET NAPOLITANO
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

BILL LOCKYER
Attorney General
of California
1300 I Street
Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19810

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland
200 St. Paul Place
Baltimore, MD 21202

THOMAS F. REILLY
Attorney General
of Massachusetts
1 Ashburton Place
Boston, MA 02108

MIKE MOORE
Attorney General
of Mississippi
450 High Street
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

JOHN J. FARMER, JR.
Attorney General
of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625

WAYNE STENEHJEM
Attorney General
of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-004

W.A. DREW EDMONDSON
Attorney General
of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105-4894

D. MICHAEL FISHER
Attorney General
of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

CHARLES M. CONDON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

JAMES E. DOYLE
Attorney General of Wisconsin
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A "TOTAL LACK OF CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT IS UNWARRANTED AND UNWORKABLE 2

A. Introduction 2

B. A "Total Lack Of Control" Requirement Is Not Supported By The Court's Decision In *Kansas v. Hendricks* 4

C. The Impact Of A "Total Lack Of Control" Standard On The States Will Be Significant 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

Addington v. Texas,
441 U.S. 418 (1979) 4, 5

Commonwealth v. Bruno,
432 Mass. 489, 735 N.E.2d 1222 (2000) 3

Foucha v. Louisiana,
504 U.S. 71 (1992) 5

Heller v. Doe,
509 U.S. 312 (1993) 4

In re the Detention of Brooks,
94 Wash. App. 716, 973
P.2d 486 (1st Div. 1999) 7

In re the Matter of Crane,
269 Kan. 578, 7 P.2d 285 (2000) 1, 4

In re the Matter of W.Z.,
2001 N.J. Super. LEXIS 172 ..... 8, 9

In re Young,
122 Wash.2d 1, 857 P.2d 989 (1993) 3

Kansas v. Hendricks,
521 U.S. 346 (1997) ..... *passim*

Seling v. Young,
531 U.S. 250 (2001) 5

STATUTES:

A.R.S. § 36-3701 2

Cal Wel & Inst Code § 6600 ..... 2, 3

Fla. Stat. § 394.910 3

Fla. Stat. § 394.912 6

725 ILCS 207/1 3

725 ILCS 207/5 6

Iowa Code § 229A.1 3

K.S.A. § 59-29a01 3

Mass. Ann. Laws ch. 123A, § 1 ..... 3, 6

Minn. Stat. §§ 253B.185 3

§ 632.480 R.S.Mo. 3

N.J. Stat. § 30:4-27.25 3

N.J. Stat. § 30:4-27.26 6

N.D. Cent. Code, § 25-03.3-01 3

S.C. Code Ann. § 44-48-100 3

Tex. Health & Safety Code § 841.081 3

Va. Code Ann. § 37.1-70.6 3

Rev. Code Wash. (ARCW) § 71.09.010 3

Rev. Code Wash. (ARCW) § 71.09.020(2) 6

Wis. Stat. § 980.01 3

OTHER MATERIALS:

Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 Bull.Am.Acad. Psychiatry Law 159 (1994) 11

H. Rep. No. 98-1030, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 11

INTEREST OF THE AMICI CURIAE

This case addresses the appropriate substantive due process inquiry in involuntary commitment proceedings against certain violent sex offenders pursuant to state commitment statutes. The Court's resolution of this question will affect the continued commitment of the more than 1200 persons currently committed pursuant to state statutes, and the future operation of those state statutes in furtherance of their stated purpose. As the chief legal officers of the States, the undersigned Attorneys General have a direct and significant interest in the outcome of the case.

SUMMARY OF ARGUMENT

Following the Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that the Kansas Sexually Violent Predator Act (the "Act") satisfied constitutional requirements of substantive due process, the Supreme Court of Kansas held, based on the Court's language in *Hendricks*, that the Act violates substantive due process absent a determination that the respondent cannot control his behavior. The "total lack of control" requirement set forth in *In re the Matter of Crane*, 269 Kan. 578, 7 P.2d 285 (2000) is not supported by the language of *Hendricks*, and, if adopted, will severely impede exercise of state statutes enacted to provide for the civil commitment of certain sexually violent offenders.

The state statutes providing for such civil commitments are designed to address the concerns of public safety and treatment for sexually violent persons. This purpose is appropriately served by legislation that provides reasonable solutions to the problem. Historically in the civil commitment context, reasonableness is met

when a statute requires proof of dangerousness and proof of "mental illness" or "mental abnormality." The Court reiterated this requirement in *Hendricks*, but declined to require uniform definitions for terms such as "mental illness" or "mental abnormality, or to impose a different standard for substantive due process on these statutes. The Kansas Act does, indeed, require the proof of dangerousness and the proof of "mental abnormality."

Nothing in the *Hendricks* decision supports the *Crane* court's conclusion that a total lack of volitional control must be proven to support commitment under the Act. In fact, in *Hendricks*, the Court recognizes that it is the lack of adequate control that must result from the "mental abnormality." Either "emotional" or "volitional" impairment can provide the requisite abnormality, as it is the "mental abnormality" (linked with dangerousness) that is the key factor in determining eligibility for commitment under the Act.

ARGUMENT

A "TOTAL LACK OF CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT IS UNWARRANTED AND UNWORKABLE.

A. Introduction

Sixteen states have enacted statutes providing for the involuntary commitment of sexually violent offenders.[1] While the precise language of these statutes varies

---

[1] The following states currently have statutes providing for the involuntary commitment of sexually violent offenders: Arizona (A.R.S. § 36-3701), California (Cal Wel & Inst Code (continued...)

somewhat, the purpose behind the laws is uniform: to protect the public from those offenders who pose a continued substantial risk of committing violent sex offenses, until such time as treatment has removed such risk.[2] The purpose of the commitment statutes would be severely compromised by applying a "cannot control" requirement on the standard of proof necessary for

---

[1] (...continued)
§ 6600), Florida (Fla. Stat. § 394.910), Illinois (725 ILCS 207/1), Iowa (Iowa Code § 229A.1), Kansas (K.S.A. § 59-29a01), Massachusetts (Mass. Ann. Laws ch. 123A, § 1), Minnesota (Minn. Stat. §§ 253B.185), Missouri (§ 632.480 R.S.Mo.), New Jersey (N.J. Stat. § 30:4-27.25), North Dakota (N.D. Cent. Code, § 25-03.3-01), South Carolina (S.C. Code Ann. § 44-48-100), Texas (Tex. Health & Safety Code § 841.081), Virginia (Va. Code Ann. § 37.1-70.6), Washington (Rev.Code Wash. (ARCW) § 71.09.010, and Wisconsin (Wis. Stat. § 980.01).

[2] *See e.g.* 91st Ill. Gen. Assem., Senate Proceedings, March 3, 2000, at 192 (purpose of proposed Sexually Violent Persons Commitment Act is to address the fact that sex offenders are difficult to rehabilitate and tend to be repeat offenders and protect society from those offenders who pose a continued danger to society by their civil commitment); Iowa Code § 229A.1 (purpose of commitment under the Sexually Violent Predator Act is public safety and treatment of the committed individual); *In re Young*, 122 Wash.2d 1, 10, 857 P.2d 989, 992 (1993) (ultimate goal of sexually violent predator provisions of Community Protection Act of 1990 is treatment and cure, while short-term goal is protection of the community; *Commonwealth v. Bruno*, 432 Mass. 489, 500, 735 N.E.2d 1222, 1231 (2000) (dual purpose of the statute is protection of the public and treatment and rehabilitation of sexually dangerous persons).

commitment. Such a requirement is both unworkable and unwarranted in the context of a civil commitment statute.

B. A Total Lack of Control Requirement is Not Supported by The Court's Decision in *Kansas v. Hendricks*.

In its decision in *In re the Matter of Crane*, 269 Kan. 578, 7 P.2d 285 (2000), the Supreme Court of Kansas held, "[a] fair reading of the majority opinion in [*Kansas v.] Hendricks* [521 U.S. 346 (1997)] leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior." 269 Kan. at 578. The finding was based on the Kansas Court's conclusion that although this Court upheld the Kansas Sexually Violent Predator Act in *Hendricks*, it did not contemplate the constitutionality of definitions within that Act which provided for commitment while requiring less than a complete inability to control behavior. *Id.*

The suggestion by the Supreme Court of Kansas that this Court confined its opinion in *Hendricks* solely to the facts of that case, and desires to interpret every definition in the Kansas statute and the several such state statutes in effect nationwide is unsupported by the language of *Hendricks* and other precedent of the Court. Particularly in the context of civil commitment statutes, the Court has historically deferred to state legislation where the laws reflect reasonable solutions to problems facing the states. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Addington v. Texas*, 441 U.S. 418, 431 (1979). In this case, the States that have enacted statutes providing for the involuntary commitment of sexually danger-

ous individuals have done so in efforts to fashion a solution to the parallel problems of public safety and the treatment of sexually dangerous offenders. The lower court's holding in *Crane* turns the due process requirement that States make reasonable legislative judgments into an obstacle for the States in doing just that. By making the statutory definition in the Kansas Act (and those similarly fashioned statutes in other States) unattainable in practice, the *Crane* court impedes the States' exercise of their assigned powers. The commitment statutes of the various states share common definitions, and all satisfy the minimum standards of constitutionality.

The Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), does not hold otherwise. In upholding Kansas' Sexually Violent Predator Act, the Court reiterated the reasoning set forth in other cases involving civil commitment statutes, and held that the key requirement of such statutes is a link between a proof of dangerousness and proof of another factor such as "mental illness" or "mental abnormality." 521 U.S. at 358. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Addington,* 441 U.S. at 425-426. The Kansas Act and the other similar state statutes require a mental disorder which affects a person's ability to control his dangerousness. The disorder predisposes the person to commit dangerous acts. Due process does not require the State to demonstrate that a person's actions are a result of an uncontrollable impulse caused by the disorder. The language of *Hendricks* requires only the nexus between the disorder and the acts.

The Court further noted, "Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather,

we have traditionally left to legislatures the task of defining terms of a medical nature that have legal significance." *Hendricks*, 521 U.S. at 359. The terms "emotional" and "volitional," as used in Kansas' statutory definition of "mental abnormality" and in similar definitions in other state statutes,[3] are merely different words used to describe a single aspect of the overall condition that constitutes "mental abnormality," which when linked with proof of dangerousness, meets the criteria reiterated by the Court in *Hendricks*. Indeed, in *Hendricks*, the Court acknowledges that the mental abnormality may result in an inability to control, difficulty in controlling, or prevent the exercise of "adequate control" over the harmful behavior. *Hendricks*, 521 U.S. at 357, 358, 362. This language implies that something less than a complete inability to control the harmful behavior is sufficient for constitutional purposes.[4]

---

[3] The use of the terms "emotional" and "volitional" as alternatives is not unique to the Kansas definition of "mental abnormality". For example, in Illinois, the definition of "mental disorder" includes "emotional capacity" and "volitional capacity" as alternatives. 725 ILCS §207/5(b). *See also*, Fla. Stat. § 394.912(5) (including "emotional" and "volitional" as alternatives; ARCW 71.09.020(2) (Washington) (defining "mental abnormality" with alternative capacities); Mass. Ann. Laws ch. 123A § 1 (using alternatives of "emotional" and "volitional" capacity in the definition of "mental abnormality); N.J. Stat. § 30:4-27.26 (defining "mental abnormality" with alternatives of "emotional capacity", "volitional capacity", and "cognitive capacity").

[4] Indeed, although the Court later used the phrase "unable to control" when referring to Mr. Hendricks' condition (521

(continued...)

The Court of Appeals of Washington so construed the Court's language in *Hendricks*:

> In interpreting the Kansas statute, the Supreme Court found that the statutory requirements limited "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." [citation omitted] The Court did not require, as [Appellant] asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it "difficult, if not impossible, for the person to control his dangerous behavior." [citation omitted]

In re the Detention of Brooks, 94 Wash. App. 716, 729, 973 P.2d 486 (1st Div. 1999).

Because the statutory language used by the Kansas legislature meets minimum constitutional standards, the requirement that there be a finding of a total lack of control, as stated by the court below in *Crane*, is unwarranted. Imposition of such a standard on the States by the Court, then, would be contrary to the Court's established precedent.

The definition found in the Kansas statute furthers the purpose of the Kansas Sexual Predator Act and similar acts in the various States. As stated above, the purpose of the several statutes permitting involuntary commit-

---

[4] (...continued)
U.S. at 364), that language must be read as relating to the preceding references to difficulties in exerting adequate control over the dangerous behavior, rather than as a complete inability to control the behavior.

ment of sexually violent offenders is the protection of the public and the treatment of the sexually dangerous. The States respectfully suggest that this purpose is, indeed, served by a definition of "mental abnormality" or "mental disorder" that recognizes the variety of ways in which a lack of control over one's actions may be manifested. The focus by the Supreme Court of Kansas on impairment which leads to a total lack of volitional control ignores equally compelling emotional or cognitive impairments which might result in a significant lack of control over one's actions.

As the New Jersey appellate court recently reasoned, the inclusion of emotional and even cognitive impairments as alternative abnormalities to volitional impairment, does not nullify the statute in the wake of the *Hendricks* decision. *In re the Matter of W.Z.*, 2001 N.J. Super LEXIS 172, *25-26. Instead, inclusion of additional types of impairments in the statutory definitions serves the purpose of the statute by permitting application of the statute to persons who, due to their disorder, will not control their behavior and are, therefore, dangerous. This can result from one or more of several legitimate impairments. Again, the State need not prove that a person's actions are the result of some uncontrollable urge; the relationship between the disorder and the acts is what must be shown. *Hendricks*, 521 U.S. at 358.

Application of the total lack of control standard enunciated by the Supreme Court of Kansas in *Crane* would essentially render meaningless a significant portion of the definitions of "mental disorder," "mental abnormality," and the like included in the statutes throughout the States. The New Jersey appellate court noted this as well:

> [T]he effect of the quoted passage in *In re Crane* is to nullify language intentionally written into the statute by the state legislature. In New Jersey, we must avoid statutory construction which renders part of a statute "inoperative, superfluous or meaningless." [Citation omitted].

W.Z., 2001 N.J. Super. LEXIS 172, * 28. The latitude which states have historically been granted regarding civil commitment standards encompasses the definitions included in the Kansas statute and those similar statutes in other States. See, *Hendricks*, 521 U.S. at 359.

C. The Impact of A Total Lack of Control Standard on the States Will Be Significant.

The imposition of a total lack of control standard will have a significant impact on the States with statutes providing for civil commitment of certain sex offenders. To date, more than 1200 persons have been committed in the eighteen States that have statutes akin to the Kansas Sexually Violent Predator Act.[5] Each of these offenders is potentially affected by the decision in this case. More certainly, the future use of the commitment statutes will be abrogated by the adoption of a "cannot control" standard. Because the burden of demonstrating

---

[5] This figure represents reports received from only thirteen states. The following statistics regarding current commitments were reported to undersigned counsel pursuant to a request: Arizona - 71; California - 270; Florida - 33; Illinois - 78; Iowa - 17; Kansas - 65; Minnesota - 182; Missouri - 15; New Jersey - 136; North Dakota - 9; South Carolina - 38; Washington - 84; Wisconsin - 213.

a total lack of volitional control in any given offender would be nearly impossible, the States will lose use of a tool with which to implement the goals of community safety and offender treatment and rehabilitation.

A standard requiring a total lack of control disregards an obvious level of control that is inherent in sexual offenders. This control is exhibited by the way in which sex offenders manipulate their environments and create opportunities for offenses. For example, factual scenarios involving pedophiles rarely, if ever, describe an offender who attacks every child he encounters in a given day. Instead, the more common case includes descriptions of the efforts to which the pedophiles went to be in an environment in which they could win the trust of children who could then become their victims. Under the standard suggested in *Crane*, the ability to control the environment and create the opportunity to offend could demonstrate an ability to control behavior that would remove the offender from the reach of the commitment statutes. It is obvious, however, that the statutes were drafted with just such offenders in mind. Application of this standard will frustrate the intent of the several state legislatures.

Implementation of an inability to control standard is fraught with problems. The standard articulated by the Supreme Court of Kansas is in the nature of "irresistible impulse," a requirement which has proved unworkable in the criminal context. Legal and psychiatric commentators agree that whether a person is able to control his impulses—whether an impulse is truly irresistible—is ultimately unknowable:

> [F]amously, we cannot distinguish between irresistible impulses and those impulses simply not resisted. . . . [T]he studies do not address and folk psychology does not know whether and to what degree people are unable to refrain from acting. Neither in psychology, philosophy, nor folk psychology is there a reasonable uncontroversial understanding of these matters.

Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 Bull. Am. Acad. Psychiatry Law 159, 177 (1994).

> There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that is irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by "moral guesses."

H. Rep. No. 98-1030, 98th Cong., 1st Sess. (1983) at 226-27, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3408-09 (*quoting* Professor Richard J. Bonnie).

> No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.

Id. (*quoting* Professor Paul H. Robinson). The volitional test for criminal insanity has proven nearly impossible

to implement and has, therefore, been largely abandoned in the criminal context. Implementation of a similar standard in the context of civil commitment laws would appear similarly futile.

Adoption of a complete lack of control standard would significantly impair the legitimate and substantial interests of those states with sexually violent predator acts. The Kansas Act, and the similar statutes in other states, were adopted in order to provide sexually violent predators with long-term, sex-offender-specific treatment in a secure facility while, at the same time, protecting society from their actions. With those irrefutably compelling goals in mind, the undersigned states submit that the *Crane* court's reading of *Hendricks* is contrary to the stated legislatures in enacting commitment laws for the custody, care and treatment of sexually violent predators. Thus, the *Crane* court's complete lack of control standard should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to reverse the lower-court decision.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
LISA ANNE HOFFMAN
Counsel of Record
MARGARET M. O'CONNELL
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2640

Counsel for *Amici* States

June 15, 2001